Development & Commercial Bank Bhd v Datuk Ong Kian Seng

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-153-92
PEH SWEE CHIN, MOHAMED DZAIDDIN AND LAMIN FCJJ
7 JULY 1995

Bankruptcy *— Practice and procedure — Bankruptcy notice — Dispute as to calculation of interest — Whether must be made in Form 16 — Whether can be made by affidavit — Whether failure to file notice in Form 16 a mere irregularity which can be cured — Bankruptcy Act 1967 s 131 — Bankruptcy Rules 1969 rr 18 & 117*

The appellant ('the bank') entered a final consent judgment against the respondent ('the debtor') for RM441,404.96 which was owed by the debtor under two banking facilities granted by the bank to him. The debtor failed to pay the judgment debt and the bank issued a bankruptcy notice on 14 June 1991, followed by the filing of a creditor's petition on 22 August 1991. On 18 February 1992, the debtor filed an affidavit opposing the petition contending that the bankruptcy notice was invalid on the ground that the interest specified was wrongly calculated. At the hearing of the petition, the bank raised the preliminary objection that the debtor's affidavit was not a proper notice to oppose the petition under r 117 of the Bankruptcy Rules 1969 ('the Rules') as he was required to file a notice in Form 16 specifying the statements in the petition which he disputed. The judge overruled the objection and held that the affidavit was sufficient to give notice to the bank of the debtor's intention to oppose the petition and that the failure to file a notice under r 117 was only a formal defect which did not cause substantial injustice to the bank, relying on s 131 of the Bankruptcy Act 1967 (the Act') and r 274 of the Rules. The judge then dismissed the petition on the ground that the amount demanded in the bankruptcy notice was not in accordance with the terms of the consent order and was therefore invalid. The appellant appealed on the grounds that the judge erred in law: (i) in treating the debtor's affidavit as a notice to oppose the petition under r 117 of the Rules; and (2) in holding the amount in the bankruptcy notice was not in accordance with the terms of the consent order in view of proviso (ii) to s 3(2) of the Act which provides that a bankruptcy notice shall not be invalidated by reason that the amount specified is in excess of the judgment sum unless the debtor within the time prescribed disputes the validity of the notice on the ground of such mistake.

Held, allowing the appeal and ordering the making of receiving and adjudication orders with effect from 6 March 1992:

(1) Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice in Form 16 of the Rules specifying the statements in the petition which he intends to

deny or dispute. Rule 18 further provides that except where the Rules or the Act provide, every application shall, unless the court otherwise directs, be made by motion supported by an affidavit. Failure to follow r 18 renders an affidavit in opposition ineffective and bad in law. Accordingly, the debtor's affidavit in opposition could not be substituted as a notice to show cause against the petition to challenge the validity of the bankruptcy notice.

(2) The debtor's failure to file a notice under r 117 supported by an affidavit could not be excused as a mere formal defect. Rule 117 clearly provides that if a debtor intends to show cause against the petition, he shall file a notice in Form 16. No breach of a mandatory rule can be described as a formal defect or an irregularity that can be cured. Section 131 of the Act and r 274 of the Rules do not apply.

(3) Moreover, the debtor could not be allowed to dispute the validity of the bankruptcy notice because the notice by way of his affidavit affirmed on 18 February 1992 did not comply with proviso (ii) to s 3(2) of the Act, as it had been served on the bank about seven months after the service of the bankruptcy notice on him.

[Bahasa Malaysia summary

Perayu ('bank itu') telah mencatatkan penghakiman persetujuan muktamad terhadap responden ('penghutang') untuk jumlah RM441,404.96 yang dihutang oleh penghutang di bawah dua kemudahan bank yang diberikan oleh bank itu kepada beliau. Penghutang gagal membayar hutang penghakiman itu dan bank itu telah mengeluarkan suatu notis kebankrapan pada 14 Jun 1991, diikuti oleh pemfailan petisyen pemiutang pada 22 Ogos 1991. Pada 18 Februari 1992, penghutang telah memfailkan suatu afidavit yang menentang petisyen itu dan menegaskan bahawa notis kebankrapan itu tidak sah kerana faedah yang dinyatakan telah dikira dengan salah. Pada pembicaraan petisyen itu, bank itu telah menimbulkan bantahan permulaan bahawa afidavit penghutang tidak merupakan suatu notis yang betul untuk menentang petisyen itu di bawah k 117 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah itu') kerana beliau perlu memfailkan suatu notis mengikut Borang 16 yang menyatakan dengan spesifik kenyataan manakah yang dipertikaikan oleh beliau. Hakim telah menolak bantahan itu dan memutuskan bahawa afidavit tersebut adalah mencukupi untuk memberi notis kepada bank itu tentang niat penghutang untuk menentang petisyen tersebut dan bahawa kegagalan untuk memfailkan suatu notis di bawah k 117 hanya suatu kecacatan formal yang tidak mengakibatkan ketidakadilan yang substansial kepada bank itu, bergantung pada s 131 Akta Kebankrapan 1967 ('Akta itu') dan k 274 Kaedah itu. Hakim kemudiannya menolak petisyen itu atas alasan bahawa jumlah yang dituntut di dalam notis kebankrapan itu tidak mengikut terma penghakiman persetujuan itu dan oleh itu adalah tidak sah. Perayu

telah membuat rayuan atas alasan bahawa hakim itu telah membuat kesilapan di sisi undang-undang: (1) apabila beliau menganggap afidavit penghutang sebagai suatu notis untuk menentang petisyen itu di bawah k 117 Kaedah itu; dan (2) apabila memutuskan bahawa jumlah di dalam notis kebankrapan itu tidak mengikut terma perintah persetujuan itu memandangkan proviso (ii) kepada s 3(2) Akta itu yang memperuntukkan bahawa suatu notis kebankrapan tidak akan ditaksahkan kerana jumlah yang dinyatakan adalah lebih daripada jumlah penghakiman kecuali jika penghutang dalam masa yang ditetapkan mempertikaikan kesahan notis itu atas alasan kesilapan tersebut.

Diputuskan, membenarkan rayuan itu dan mengarahkan supaya perintah penerimaan dan penghukuman dibuat berkesan dari 6 Mac 1992:

(1) Kaedah 117 memperuntukkan bahawa di mana seseorang penghutang ingin menunjukkan kausa terhadap sesuatu petisyen, beliau mesti memfailkan suatu notis mengikut Borang 16 Kaedah itu yang menyatakan dengan spesifik kenyataan mana di dalam petisyen itu yang beliau ingin menafikan atau mempertikaikan. Kaedah 18 selanjutnya memperuntukkan bahawa kecuali di mana diperuntukkan oleh Kaedah atau Akta itu, setiap permohonan mesti, kecuali jika mahkamah mengarahkan sebaliknya, dibuat oleh usul dan disokong oleh afidavit. Kegagalan untuk mematuhi k 18 mengakibatkan suatu afidavit menentang itu tidak berkesan dan buruk di sisi undang-undang. Dengan yang demikian, afidavit menentang yang difailkan oleh penghutang tidak boleh menggantikan suatu notis untuk menunjukkan kausa terhadap petisyen itu untuk mencabar kesahan notis kebankrapan itu.

(2) Kegagalan penghutang untuk memfailkan suatu notis di bawah k 117 disokong oleh suatu afidavit tidak boleh dimaafkan sebagai suatu kecacatan formal semata-matanya. Kaedah 117 dengan jelas memperuntukkan bahawa jika seorang penghutang bertujuan untuk menunjukkan kausa terhadap sesuatu petisyen, beliau mesti memfailkan suatu notis di dalam Borang 16. Perlanggaran suatu peraturan yang mandatori tidak boleh dikatakan suatu kecacatan formal atau suatu luar aturan yang boleh dibetulkan. Seksyen 131 Akta itu dan k 274 Kaedah itu tidak terpakai.

(3) Lebih-lebih lagi, penghutang tidak boleh dibenarkan mempertikaikan kesahan notis kebankrapan itu kerana notis melalui afidavit beliau yang diikrarkan pada 18 Februari 1992 tidak mematuhi proviso (ii) kepada s 3(2) Akta itu, kerana ia telah disampaikan kepada bank itu lebih kurang tujuh bulan selepas penyampaian notis kebankrapan kepada beliau.]

Notes

For cases on practice and procedure in bankruptcy proceedings, see 1 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1532–1564.

Cases referred to

Au-Yong v Dicum & Anor [1963] MLJ 349 (folld)
Dale, ex p (1876) 3 Ch D 322 (distd)
Debtor, Re A, ex p The Debtor v Hungerford Rural District Council [1973] 1 All ER 797; [1973] 1 WLR 733 (refd)
Ismail bin Daud & Anor, ex p Universal Life & General Insurance Sdn Bhd, Re [1990] 1 MLJ 118 (refd)
Ley Boon Hee, Re [1990] 2 MLJ 508 (refd)
Lim Kheng Kim, Datuk v Malayan Banking Bhd [1993] 2 MLJ 298 (folld)
Mohd Sari bin Datuk Haji Nuar, Datuk v Norwich Winterthur Insurance (M) Sdn Bhd [1992] 2 MLJ 344 (distd)
Rengasamy Pillai v Comptroller of Income Tax [1970] 1 MLJ 233 (distd)

Legislation referred to

Bankruptcy Act 1967 ss 6, 131
Bankruptcy Rules 1969 rr 18, 117, 274
Bankruptcy Act 1914 s 147(1) [Eng]
Bankruptcy Rules 1870 r 36 [Eng]

Appeal from: Code No D4–29–2999–91 (High Court, Kuala Lumpur)

Siew Yew Ming (*Raja Eleena Siew Ang & Tan*) for the appellant.
Jasvinder Kaur (*KS Narayanan Associates*) for the respondent.

Cur Adv Vult

Mohamed Dzaiddin FCJ (delivering the judgment of the court): This was an appeal from the decision of the High Court Kuala Lumpur given on 6 March 1992 dismissing the creditor's petition filed against the debtor under s 6 of the Bankruptcy Act 1967 ('the Act').

Facts

Datuk Ong Kian Seng, the debtor, was indebted to the Development & Commercial Bank Bhd ('the bank'), the petitioning creditor, under two banking facilities granted by the bank to him for a total amount of RM441,404.96. On 7 April 1988, a final consent judgment was obtained by the bank against the debtor for the aforesaid sum together with interest. The consent order reads as follows:

> By consent it is ordered that the plaintiff be at liberty to enter summary judgment against the defendant in the sum of RM441,404.96 together with interest on the sum of RM294,752.87 at the rate of 18%pa from 1 May 1986 to date of final payment and further interest on RM146,652.09 at the rate of 18%pa from 1 May 1986 to date of final payment and costs of RM225 and by consent it is ordered that the sum of RM280,000 obtained

from the purported sale of the defendant's property held under Geran Mukim No GM915 Lot No 5026 Mukim of Batu to one Lim Chiew Kee and in the event the sale is not abortive the sum of RM280,000 shall be deducted from the judgment sum and that in the event the purported sale is abortive the plaintiff shall be entitled to recover the total judgment amount due hereinbefore mentioned and by consent it is further ordered that the defendant do pay the plaintiff the balance outstanding judgment sum together with all the accrued interest thereon by equal monthly instalments of RM25,000 commencing from 1 May 1988 until full settlement thereof and by consent it is further ordered that in the event the defendant defaults in any one of the aforesaid instalment payments the plaintiff shall be at liberty to enforce the judgment order herein for the whole outstanding amount then due and owing and by consent it is lastly ordered that the defendant do pay the agreed legal fees of RM5,000.

Dated 7 April 1988.

—Sgd—
Senior assistant registrar
High Court, Kuala Lumpur

After the judgment but before the issue of the bankruptcy notice, certain payment from the proceeds of sale of the debtor's property was credited to his account leaving a balance sum of RM322,642.72. The figures showing how this balance was arrived at are set out in the following 'Particulars' in the bankruptcy notice:

Particulars

Decretal sum		RM441,404.96	
1.	Fixed loan	RM146,652.09	
	Add: Interest from 1 May 1986 to 30 June 1988 @ 18%pa	RM54,963.42	
	Less: Proceeds of sale	(RM201,615.51)	Nil
2.	Overdraft	RM294,752.87	
	Add: Interest from 1 May 1986 to 14 June 1991 @ 18%pa	RM191,049.34	
	Add: Costs	RM5,225.00	
	Less: Proceeds of sale	(RM78,384.49)	
	Payments	(RM25,000.00)	
		(RM15,000.00)	
		(RM25,000.00)	
		(RM25,000.00)	RM322,642.72
			RM322,642.72

Having failed to pay the aforesaid debt, the bank then issued a bankruptcy notice on 14 June 1991 which was served on the debtor on 8 July 1991. The notice required the debtor within seven days after the service of the notice to pay to the bank the said sum of RM322,642.72 being the amount due on a final judgment obtained for a total amount of RM441,404.96. This was followed by the filing of the creditor's petition on 22 August 1991. On 18 February 1992, the debtor filed an affidavit opposing the

petition contending that the bankruptcy notice was invalid on the ground that the interest specified in the said notice as shown in the 'Particulars' was wrongly calculated.

At the hearing of the creditor's petition, counsel for the bank raised a preliminary objection with respect to the debtor's affidavit which was used to oppose the petition. Counsel submitted that the said affidavit was not a proper notice to oppose the creditor's petition under r 117 of the Bankruptcy Rules 1969 ('the Rules'). The debtor must file a notice in Form 16 with the Registrar specifying the statements in the petition which he intends to deny or dispute. The learned judge overruled the objection and held that the said affidavit was sufficient to give notice to the bank that the debtor intended to oppose the petition on the ground that the bankruptcy notice was bad in law. He also held that the debtor's failure to file a notice under r 117 was only a formal defect which did not cause substantial injustice to the bank. His Lordship followed *Ex p Dale* (1876) 3 Ch D 322 and relied on s 131 of the Act and r 274 of the Rules.

Having disposed of the preliminary point, his Lordship then proceeded to hear the petition. From the grounds of judgment, it would seem to us that the learned judge in dismissing the creditor's petition approached the matter upon the basis that the amount demanded in the bankruptcy notice was not in accordance with the terms of the consent order and therefore was invalid. Hence, his Lordship stated (at p 20 of the appeal record):

> The question to be considered here is whether the bankruptcy notice remained valid not only by reason that the sum specified in the notice exceeded the amount actually due but also by reason that the sum specified was not in accordance with the terms of the judgment or order.
>
> Recently, the Supreme Court in *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 344, decided that the demand for payment in the bankruptcy notice issued by the respondent against the appellant was not in accordance with the terms of the consent judgment as required by s 3(1)(i) of the bankruptcy Act but was in accordance with the terms of an agreement subsequently entered into by the parties and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act.

He continued (at p 23):

> It is clear that the principle laid down in *Datuk Mohd Sari*'s case is that the s 3(2) proviso (ii) is limited to excess demands only and does not apply to a situation where the demand for payment with the bankruptcy notice is not in accordance with the terms of the judgment or order as required by s 3(1)(i) of the Act. Non-compliance with such notice does not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act. Such notice cannot be regarded as a valid notice.
>
> Bearing in mind the principle laid down in *Datuk Mohd Sari*'s case, it is now necessary to examine whether the demand for payment as stated in the bankruptcy notice in the present case is in accordance with the terms of the final judgment or order.

Finally, his Lordship concluded (at p 30 of the appeal record):

Applying the principle laid down in *Datuk Mohd Sari*'s case, I found that in the present case, the debtor did not raise *only* the question that the amount demanded in the notice was in excess of the amount actually due. The debtor indeed went further to state that the amount demanded in the notice was not calculated in accordance with the terms of the consent order.

I was satisfied that, for the reasons stated above, the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent order as required by s 3(1)(i) of the Bankruptcy Act. The bankruptcy notice was therefore invalid and non-compliance with the bankruptcy notice did not constitute an act of bankruptcy on the strict construction of the Bankruptcy Act.

The creditor's petition was founded on the said bankruptcy notice and since the bankruptcy notice was not valid the creditor's petition must fail.

For the reasons stated above I dismissed the creditor's petition with costs.

Before us, Encik Siew Yew Ming, for the appellant, challenged the correctness of the learned judge's decision on four grounds, which for the purpose of this appeal, we have narrowed down to two principal grounds, viz: (1) that the learned judge erred in law to treat the respondent's affidavit as a notice to oppose the creditor's petition under r 117 of the Rules; (2) that the learned judge also erred in holding the amount in the bankruptcy notice was not in accordance with the terms of the consent order. With respect to the first ground, it was submitted both here and in the court below, that the respondent must comply with rr 18 and 117 of the Rules and that the learned judge was bound by the Supreme Court decision in *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298. On the second ground, counsel maintained that since no notice of the excess amount was given under s 3(2) proviso (ii), the amount specified in the bankruptcy notice must be accepted to be correct. In the circumstances of this case, the bankruptcy notice was in accordance with the consent order. Section 3(2) proviso (ii) provides that a bankruptcy notice shall not be invalidated by reason that the amount specified in the notice was in excess of the judgment sum unless the debtor within the time prescribed in the bankruptcy notice disputed the validity of the notice on the ground of such mistake. Counsel relied on *Re A Debtor, ex p The Debtor v Hungerford Rural District Council* [1973] 1 All ER 797 at p 798; [1973] 1 WLR 733 at p 735; *Re Ismail bin Daud & Anor, ex p Universal Life & General Insurance Sdn Bhd* [1990] 1 MLJ 118 and *Re Ley Boon Hee* [1990] 2 MLJ 508. Counsel further submitted that the principles in *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 344 did not apply to the present case.

Cik Kaur, for the respondent, repeated her submission made in the court below. She maintained that the amount specified in the consent order upon which the bankruptcy notice was founded was different from the amount stated in the bankruptcy notice and therefore was not in accordance with the terms of the consent order within the provision of s 3(1)(i) of the Act.

A Thus, the first and crucial question which arises for our decision is whether the respondent can treat his affidavit affirmed on 18 February 1992 as a notice to oppose the creditor's petition. The learned judge has ruled that he can since his failure to file a notice under r 117 is only a formal defect which has not caused substantial injustice to the appellant. In ruling that the respondent's failure to file a notice showing cause against B the petition is only a formal defect, his Lordship relied on *Ex p Dale*, and the provisions of s 131 of the Act and r 274.

Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The contents of the notice can be C found in Form 16 of the Rules wherein it must be stated that he intends to oppose the making of the receiving order as prayed and that he intends either to dispute the petitioning creditor's debt or the act of bankruptcy or as the case may be. Rule 18 of the Rules further provides that except where the Rules or the Act provide, every application shall, unless the court D otherwise directs, be made by motion supported by an affidavit. In *Datuk Lim Kheng Kim*, the Supreme Court held that failure to follow r 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or E cross-demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. This court has no reason to disagree with the decision and will follow it. Accordingly, in our view, the respondent's affidavit in opposition cannot be substituted as a notice to show cause against the creditor's petition to challenge the validity F of the bankruptcy notice.

Further, we are of the view that the respondent's failure to file a notice under r 117 supported by an affidavit cannot be excused as a mere formal defect. The learned judge relied on *ex p Dale*, where in that case the solicitor had inadvertently omitted to file a notice required by r 36 of the Bankruptcy Rules 1870 (which is similar to our r 117), but appeared at the G hearing and asked for leave to be allowed to dispute the debt notwithstanding the omission to give notice. The registrar refused the application and made an adjudication. On appeal, the adjudication was annulled. Bacon CJ did not give any reason for the order to be discharged and the adjudication annulled. In our view, the facts therein are clearly distinguishable and H cannot therefore apply to the facts in the present appeal. It would, however, be noted in *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233, the Privy Council found that the bankruptcy notice was not issued and expressed to be issued by the Chief Justice of the High Court in the name of the Yang DiPertuan Agong as required by s 7(1) of the Courts of Judicature Act 1964. This was held to be a formal defect which could not I reasonably mislead a debtor upon whom it was served, and was validated by s 131 of the Act. Whereas, in our case here, r 117 clearly provides that if a debtor intends to show cause against the petition, he shall file a notice

in Form 16. We hasten to add that no breach of a mandatory rule can be described as a formal defect or an irregularity that can be cured (*Au-Yong v Dicum & Anor* [1963] MLJ 349, CA at p 354).

We are also of the view that s 131 of the Act and r 274 of the Rules do not apply. Section 131, which is in the same terms as s 147(1) of the English Bankruptcy Act 1914, states:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

Lord Diplock, delivering the judgment of the Privy Council in *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233 PC, drew a distinction between a defect which renders the bankruptcy proceedings a nullity and a mere formal defect or irregularity in the following words (at p 236):

> But there is relevant authority upon the construction of the identical words in s 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a 'formal defect or irregularity'. It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused.
>
> What then is 'a formal defect or irregularity' within the meaning of the section? This was discussed in relation to a bankruptcy notice in *In re a Debtor ex p The Debtor v Bowmaker Ltd* [1951] 1 Ch 313 in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it could not reasonably mislead the debtor it was a formal defect and validated by the section. *Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a 'formal defect' and validated by the section.* (Emphasis added.)

As for r 274, it deals with the effect of non-compliance with the Rules. In view of what we have commented on s 131, we are satisfied that the said rule does not help the respondent.

For reasons we have given above, in our judgment, the respondent's affidavit was of no effect, and in consequence thereof, he could not show cause against the petition and on this ground alone this appeal should be allowed.

There is yet another ground that we ought to decide on. The judgment of the learned judge was that not only the sum specified in the bankruptcy notice had exceeded the amount actually due, it also was not in accordance

with the terms of the consent judgment, reliance having been placed on the case of *Datuk Mohd Sari* [1992] 2 MLJ 344. In the event, the learned judge held, following *Datuk Mohd Sari*, that the amount specified in the bankruptcy notice was not in accordance with the terms of the consent judgment set out above. Consequently, the bankruptcy notice was invalid and non-compliance with it did not constitute an act of bankruptcy.

With respect, we are unable to agree with him. The case of *Datuk Mohd Sari*, while distinguishable from the facts of the instant appeal, ought to be regarded as an exception to s 3(2) proviso (ii) of the Act, because what was decided [1992] 2 MLJ 344 at p 348, based on its own special facts, was that:

> ... the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by s 3(1)(i) of the Bankruptcy Act 1967 but was in accordance with the terms of an agreement subsequently entered into by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967.

To apply the ratio in *Datuk Mohd Sari* in the way the learned judge did, to every case where nothing else except when the sum specified in the bankruptcy notice is larger than the sum in accordance with a judgment on which the bankruptcy notice is based, would be undoubtedly to render nugatory s 3(2) proviso (ii) of the Act. Moreover, what is patently clear to us is that on the facts, the respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied with proviso (ii) to s 3(2) of the Act, it having been served on the appellant about seven months after the service of the bankruptcy notice on him (the respondent). The bankruptcy notice cannot therefore be challenged as to the interest specified therein.

In the result, we allow this appeal with costs here and below. The order of the court below is hereby set aside and receiving and adjudication orders be made on the creditor's petition with effect from 6 March 1992. Deposit to be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim